19 (1)

Supreme Court, U.S.
FILED
DEC 12 2008
OFFICE OF THE CLERK

No. 081054

In The
Supreme Court of the United States

MILLICENT Y. HODGE,
Petitioner,

v.

SUNOCO, INC. and NAVY YARD SUNOCO, INC.,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MILLICENT HODGE, ESQ.
PRO SE, HLS '87
FORMER U.S. PRESIDENTIAL APPOINTEE
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February 11, 2009

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I. Questions Presented:

The Supreme Court may use this case to streamline the heavy dockets of the appellate courts. The circuits are split on what constitutes a final appealable order on the merits.[1] The primary questions in this petition are (a) whether trial courts may clog this nation's appellate courts with dismissals and rulings that are issued without prejudice or are otherwise grounded solely on extraneous points; and (b) whether such rulings are final appealable orders.[2] By reversing the

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[1] *Jung v. K. & D. Mining Co., Inc.*, 356 U.S. 335, 78 S.Ct. 764, 2 L.Ed.2d 806 (1958)(holding that there was no final judgment and therefore could be no appeal when the pleading could have been amended. The Supreme Court noted the "hazards of confusion or misunderstanding" as to the time for appeal when there is no final judgment). *Wmx Technologies, Inc., F/k/a/ Waste Management, Inc., Adelaware Corporation, and Waste Management of California, Inc., v. Edwin L. Miller, Jr., U. S. Court of Appeals*, 104 F.3d 1133 (Ninth Circuit 1997)(see discussion herein).

[2] According to Black's Law Dictionary (5th Ed.), "[w]here an offer or admission is made "without prejudice," or a motion is denied or a suit dismissed "without prejudice," it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided. [...] A dismissal "without prejudice" allows a new suit to be brought on the same cause of action. The words "without prejudice", as used in judgment, ordinarily import the contemplation of further proceedings, and, when they appear in an order or decree, it shows that the judicial act is not intended to be res judicata of the merits of the controversy." *Dozier v. Ford Motor Co.*, 227 U.S. App. D.C. 1, 702 F.2d 1189, 1194 (D.C. Cir. 1983)(A dismissal without prejudice does not have a preclusive effect in future litigation); *U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007)(A dismissal without prejudice is not a final appealable order unless the plaintiff can no longer amend the pleading or unless the

decision in this action, the Supreme Court could require trial courts throughout the United States to resolve masses of minor process matters or extraneous points (e.g. rulings granted without prejudice; and/or rulings regarding formatting, lack of a courtesy paper copy, corrected court clerical errors, or the like) prior to the appellate process.[3] Such trial court orders indicate that further action is anticipated or should be taken in the lower courts prior to an appeal.[4] Such

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plaintiff declares an intention to stand on the pleading as dismissed); *Marshall v. Kansas City Southern Ry. Co.*, 378 F.3d 495, 59 Fed. R. Serv. 3d 243 (5th Cir. 2004)(A party can not use a voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final, and thus non-appealable, ruling into a final decision appealable under the appellate jurisdiction statute); *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973) (a dismissal without prejudice to filing an amended pleading is not a final order where some amendment is possible).

[3] *Dozier v. Ford Motor Co.*, 227 U.S. App. D.C. 1, 702 F.2d 1189, 1194 (D.C. Cir. 1983)(A dismissal without prejudice does not have a preclusive effect in future litigation); *U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007)(A dismissal without prejudice is not a final appealable order unless the plaintiff can no longer amend the pleading or unless the plaintiff declares an intention to stand on the pleading as dismissed); *Marshall v. Kansas City Southern Ry. Co.*, 378 F.3d 495, 59 Fed. R. Serv. 3d 243 (5th Cir. 2004)(A party can not use a voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final, and thus nonappealable, ruling into a final decision appealable under the appellate jurisdiction statute); *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973) (a dismissal without prejudice to filing an amended pleading is not a final order where some amendment is possible).

[4] According to Black's Law Dictionary (8th Ed.), the "merits" are defined as "the elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a

matters would be most efficiently handled by trial courts. Thus, in such narrow circumstances, the appellate courts would have the jurisdiction (a) to stay the period for appellate notice filing; (b) to remand such cases for a final appealable order on the merits or to otherwise resolve such matters at the trial court level; and (c) to order trial courts to verify that the relevant ruling is a final appealable order. Such a process would unclog the appellate courts. It would further reduce the confusion of appellate courts and hundreds of thousands of litigants regarding the appealability of such rulings.

I. Questions:

A. Should trial courts be allowed to clog this nation's appellate courts with rulings that are issued without prejudice, are not on the merits, or are otherwise not final?

B. Should the appellate courts have jurisdiction to extend the notice period for an appeal and remand a case to the lower courts to resolve such extraneous matters?

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case, as opposed to extraneous or technical point[s], esp. of procedure." In the instant case, the trial court rulings on post-trial filings were based on "extraneous or technical points" and did not deal with the "elements or grounds of a claim or defense" or "substantive considerations." *See Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 119 S.Ct. 1915, 144 L. Ed. 2d 184, 43 Fed. R. Serv. 3d 739 (1999)(A decision ordinarily is not "final" for purposes of appeal, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment).

C. Should the trial courts be required to state expressly whether an order is final and appealable?

D. What is a final appealable order?

1. Is an order final and appealable that is issued without prejudice?

2. Is an order final and appealable that is not decided on the merits?

   For example, is an order final and appealable that is grounded solely on (i) the absence of a paper courtesy copy (despite mandated electronic filing);[5] (ii) formatting (despite the absence of applicable court rules); (iii) a clerical error by the court clerk (that is corrected by the court clerk prior to review by the trial court); or (iv) other such extraneous matters that could be resolved most efficiently by the trial court?

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[5] In addition, no such prior request was made to either party during 2.5 years of litigation.

II. List of Parties

All parties appear in the caption of the case on the cover page.

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In the
Supreme Court of the United States
Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

I. Opinions Below.

The two opinions of the District of Columbia Court of Appeals in this case appear at Appendices A-B to the petition and are unpublished. The five opinions of the District of Columbia Superior Court in this case appear at Appendices C-G to the petition and are unpublished.

II. Jurisdiction.

The date on which the District of Columbia Court of Appeals decided the case was September 15, 2008. A copy of the decision appears at Appendix A.[6] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a) and other laws and statutes.

III. Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved herein include, but are not limited to, the equal protection, due process, and other provisions of the U.S. Constitution and laws. The rights of American

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[6] The filings before the District of Columbia Court of Appeals by the Petitioner/Appellant/Plaintiff were uncontested by the Respondents/Appellees/Defendants.

citizens and their access to state and federal appellate courts differ from jurisdiction to jurisdiction. Case law involved herein includes, but is not limited to, *Jung v. K. & D. Mining Co., Inc.*, 356 U.S. 335, 78 S.Ct. 764, 2 L.Ed.2d 806 (1958) and case law in split circuits which is cited herein.

IV. Statement of the Case.

The Respondents concealed the arrest records of their key witness in this action.[7] (*See* Appendix H attached hereto). The Petitioner discovered this matter from a non-defendant source after the trial. A number of prior discovery motions had dealt with key evidence and eighteen (18) surveillance videotapes destroyed or concealed by the Respondents, Sunoco, Inc. and Navy Yard Sunoco, Inc. (the "Respondents or Defendants"), a $25 billion corporate entity with an evidence preservation policy. Thus, within the time period required by the rules, the Petitioner filed a post-trial motion requesting a new trial and other matters at the trial court level. The motion noted an unusual number of errors by the trial court. Such errors are set forth in Appendix I, Petitioner's Response to Show Cause Order (attached hereto and incorporated herein by reference). The trial court denied the post-trial motion without prejudice for lack of a courtesy paper copy. Because the law is unclear as to whether such a ruling issued without prejudice is a final appealable order, the Petitioner filed an amended filing to provide the requested courtesy paper copy. The trial court denied the subsequent filing

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[7] The arrest records are attached hereto at Appendix "H." Such records were attached to the post-trial filing at Exhibit "A".

without prejudice for formatting. Petitioner filed an amended filing to meet the desires of the court with respect to formatting (although the court rules required no such formatting). The trial court denied the subsequent filing based on a clerical error by the court clerk (that was corrected prior to review by the trial court).

To obtain a final appealable order on the merits which is required for judicial review by a higher court, the Petitioner sought to comply with such orders of the trial court prior to filing a notice of appeal.[8] (*See* D.C. Superior Court Orders at Appendix C-G). However, the Appeals Court determined that the appeal had not been timely filed. (*See* D.C. Appeals Court Orders at Appendix A-B).[9]

V. Reasons for Granting the Writ.

The Supreme Court may use this case to streamline the heavy dockets of the appellate courts. The circuits

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[8] A party generally has the right to appeal only from an order or judgment that is final as to all claims and all parties. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *In re Estate of Chuong*, 623 A.2d 1154 (D.C. 1993)(en banc). An order is final only if it disposes of the entire case on the merits so that the court has nothing remaining to do but to execute the judgment or decrees already rendered. *Chuong*, 623 A.2d at 1157. However, the trial court rulings were not final appealable orders. They were granted without prejudice. They were not on the merits. They were not final as to any claims or parties. Their substance and form did not constitute final rulings.

[9] The appeal was timely filed after the trial court issued it last order (which cited the wrong docketing date for the first post-trial filing).

are split on what constitutes a final appealable order on the merits.

A. Supreme Court Case and Split Circuits.

As is evidenced by the case law on this issue, litigants and courts are both frequently confused by the interaction of (a) non-final, post-trial rulings by trial courts; and (b) the tolling period for filing appeal notices. The question a litigant is left with is what to do with a non-final, non-appealable, non-substantive order adversely impacting a matter critical to the case with the tolling period looming? On the one hand, rulings, final or non-final, ostensibly in some jurisdictions must be appealed within a date certain. However, on the other hand, appeals of rulings that are not final, not on the merits, or without prejudice (which by definition require further action or the related rights or privileges will be lost or waived and cannot be appealed) can be dismissed by appellate courts as not final. Appellate court rules require final rulings for review.[10] *Jung v. K. & D. Mining Co., Inc.*, 356 U.S. 335, 78 S.Ct. 764, 2 L.Ed.2d 806 (1958)(holding that there was no final judgment and therefore could be no appeal when the pleading could have been amended. The Supreme Court noted the "hazards of confusion or misunderstanding" as to the time for appeal when there is no final judgment). *Wmx Technologies, Inc., F/k/a/ Waste Management, Inc., Adelaware Corporation, and Waste Management of*

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[10] It is also a risky proposition for an appellant to file a notice of appeal prior to receiving a non-final ruling on a critical matter as the Appeals Court can refuse to hear the matter if the trial court fails to rule on the matter prior to the appeal being docketed.

California, Inc., v. Edwin L. Miller, Jr., U. S. Court of Appeals, 104 F.3d 1133 (Ninth Circuit 1997)(see discussion below).

The Supreme Court, the Ninth Circuit and treatises in this area, including *Corpus Juris Secundum* and *American Jurisprudence* 2d, have all discussed the confusion and hazards of appealing such orders (i.e. orders without prejudice or otherwise not on the merits with or without leave to amend).[11] Indeed, the Ninth Circuit surveyed the other jurisdictions and stated the following in *Wmx Technologies, Inc., F/k/a/ Waste Management, Inc., Adelaware Corporation, and Waste Management of California, Inc., supra:*

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[11] *See American Jurisprudence* 2d, Section 79, 115, 271, 273, 286-288, and 396.

See also American Jurisprudence 2d, Section 79 which states "The United States Courts of Appeal ordinarily have jurisdiction over appeals from final decisions of district courts, and an appeal generally will not lie until after final judgment has been entered in the case. A decision ordinarily is not "final" for purposes of appeal, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A party cannot use a voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final, and thus non-appealable, ruling into a final decision appealable under the appellate jurisdiction statute."

See also American Jurisprudence 2d, Section 115 which cites *U.S. ex rel. Atkinson v. PA Shipbuilding Co.*, 473 F.3d 506 (3rd Cir. 2007)(a dismissal without prejudice is not a final appealable order unless the plaintiff can no longer amend the pleading or unless the plaintiff declares an intention to stand on the pleading as dismissed.

"We recognize that the circuits have not been uniform in their approach to this issue. See (in circuit order) *North Carolina Nat'l Bank v. Montilla*, 600 F.2d 333, 334 (1st Cir.1979) (per curiam) (order dismissing an action with leave to amend is interlocutory); *Richards v. Dunne*, 325 F.2d 155, 156 (1st Cir.1963) (per curiam) (after an order dismissing claim with leave to amend, another order of final dismissal is required); *Festa v. Local 3 Int'l Bhd. of Elec. Workers*, 905 F.2d 35, 37 (2d Cir.1990) (once deadline to amend has passed, the dismissal becomes final--date of finality not specifically stated); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 278 (3d Cir.1992) (dismissal with leave to amend is not final, but can be made so if plaintiff specifically declares he will stand on his complaint); *Anastasiadis v. S.S. Little John*, 339 F.2d 538, 539-40 (5th Cir.1964) (a dismissal with leave to amend is not a final appealable order); *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir.1973) (a dismissal without prejudice to filing an amended complaint is not a final order where some amendment is possible); *Otis v. City of Chicago*, 29 F.3d 1159, 1166-68 (7th Cir.1994) (en banc) (finality springs into existence when the time for leave to amend expires--it is better to adhere to the federal rules, but not necessary and court suspects that parties will become more attentive); *Tietz v. Local 10 of Int'l Ass'n of Bridge, Struct., & Ornamental Iron Workers*, 525 F.2d 688, 689 (8th Cir.1975) (per curiam) (dismissal with leave to amend is not a final appealable order); *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 720 (10th Cir.1989) (dismissal of complaint with leave to amend is

> not appealable); *Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442, 445 (11th Cir.1986) (per curiam) (where time to amend is allowed, the order becomes final when that time expires). However, in our opinion the rule we reaffirm today is both easily applied and more consonant with the teachings of *Jung*. It requires only a modicum of diligence by the parties. and the district court, avoids uncertainty, and provides for a final look before the arduous appellate process commences.

In [*Wmx Technologies, Inc.*], the district court granted leave to amend. WMX did not choose to do so, and it did not obtain a final order of dismissal from the district court. We are, therefore, without jurisdiction.

CONCLUSION

[As the Court in Wmx Technologies, Inc. further stated,] [w]e are sometimes faced with construction difficulties when a [pleading] is simply dismissed without prejudice. Absent further explicit illumination from the district court, we may have to determine from the whole record whether it was contemplated that the dismissal was for lack of jurisdiction, whether further amendment was anticipated, whether the district court made it plain that there could be no further amendment, or whether it was contemplated that the whole action was dismissed on the merits. It would always be helpful if district courts made their intentions in that regard both plain and explicit." (emphasis added).

B. Importance of Case to United States Legal System.

We ask the Supreme Court to reverse and remand this case for a decision on the merits. Through a reversal in the instant action, such process matters or extraneous points would be resolved prior to the appellate process. In such limited circumstances, the appellate courts would have the jurisdiction (a) to stay the period for appellate notice filing; (b) to remand such cases for a final appealable order on the merits or to otherwise resolve such matters at the trial court level; and (c) to order trial courts to verify that the relevant ruling is a final appealable order. The lower courts should make their intentions plain and explicit. Such a process would unclog the appellate courts. It would further reduce the confusion of appellate courts and hundreds of thousands of litigants regarding the appealability of such rulings.

C. Additional Reasons for Granting the Writ.

See prior filings of Petitioner, including Response to Show Cause Order at Appendix I, which are incorporated herein by reference.

VI. Conclusion.

We respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

Millicent Hodge, Esq.
Pro Se, HLS '87
c/o Sherlock Grigsby
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(202) 421-1594

Date: February 11, 2009

APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 08-CV-991
2005 CAB 7034

[Filed September 15, 2008]

MILLICENT Y. HODGE,
Appellant,

v.

NAVY YARD SUNOCO, INC., *et al.*,
Appellees.

BEFORE: Reid and Thompson, Associate Judges, and Newman, Senior Judge.

ORDER

On consideration of this Court's August 20, 2008 order directing appellant to show cause why this appeal should not be dismissed as having been untimely filed and the response thereto, and it appearing that appellant noted an appeal on July 8, 2008, from a March 6, 2008 judgment, following four successive motions to set aside the verdict and for default judgment or, for a new trial, it is

ORDERED that to the extent that the appeal is taken from the judgment docketed on March 6, 2008, the appeal is hereby dismissed as untimely filed. It is

FURTHER ORDERED that to the extent that the appeal is taken from the March 25, 2008, order denying appellant's motion for reconsideration, the appeal is hereby dismissed as both untimely and having been taken from a non-appealable order. *See DeFoe v. National Capital Bank,* 90 A.2d 242, 243 (D.C. 1952)

PER CURIAM

Copies to:

Honorable Jeanette J. Clark

Clerk, Superior Court

Director, Court Reporting Division

Sherlock V. Grigsby, Esquire
601 Pennsylvania Ave., NW - Suite 900
Washington, DC 20004

Alex M. Grant, Esquire
1302 Concourse Drive - Suite #300
Linthicum, MD 21090

APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 08-CV-991
2005 CAB 7034

[Filed August 20, 2008]

MILLICENT Y. HODGE, Appellant,	)
v.	)
NAVY YARD SUNOCO, INC., *et al.*, Appellees.	)

ORDER

On consideration of the notice of appeal filed on July 10, 2008, which seeks to appeal a judgment docketed on March 6, 2008, and an order denying appellant's first motion to reconsider entered on March 25, 2008,

ORDERED that appellant shall within 20 days from the date of this order show cause why this appeal should not be dismissed as having been untimely filed. None of the appellant's motions to reconsider tolled the time for an appeal to this court. *See DeFoe v. National Capitol Bank,* 90 A.2d 242, 243 (D.C. 1952); *accord,*

Seebold v. Holbrook, 103 A.2d 876 (D.C. 1954); *Randolph v. Randolph*, 91 U.S. App. D.C. 170, 198 F.2d 956 (1952).

BY THE COURT:

/s/
ERIC T. WASHINGTON
Chief Judge

Copies to:

Honorable Jeanette J. Clark

Sherlock V. Grigsby, Esquire
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Washington, DC 20004

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1302 Concourse Drive - Suite #300
Linthicum, MD 21090

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Civil Action No.: 2005 CA 007034 B

[Filed March 25, 2008]

MILLICENT HODGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
NAVY YARD SUNOCO, INC., *et al.*,	)
	)
Defendants.	)
	)

Judge Jeanette J. Clark
Calendar 12

Next Event: Appeal

ORDER DENYING, WITHOUT PREJUDICE, PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AND FOR A DEFAULT JUDGMENT; OR, THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Upon consideration of Plaintiff's Motion to Set Aside the Verdict and for a Default Judgment or, in

the alternative, Motion for a New Trial ("Motion") and the record herein, the Motion is denied, without prejudice, for failure to comply with Administrative Order 06-17.

WHEREFORE, it is this 25th day of March 2008, hereby,

ORDERED, that Plaintiff's Motion is hereby **DENIED, without prejudice**, for failure to comply with Administrative Order 06-17. Pursuant to Administrative Order 06-17, Paragraph No. 5, a paper courtesy copy shall be delivered to chambers in addition to e-Service if the entire filing exceeds twenty-five pages. Here, Plaintiff did not provide chambers a courtesy copy of her Motion, which is 607 pages long; and it is

FURTHER ORDERED, that for each Motion filed, the parties shall e-mail a copy of the proposed order in Microsoft Word Format to the following e-mail addresses pursuant to this Court's General Order: **Clarkjj2@dcsc.gov**, and **Clarkjj3@dcsc.gov**.

SO ORDERED.

/s/
Judge Jeanette J, Clark
DC Superior Court

Copies E-filed and Docketed on this 25th day of March 2008:

Sherlock Grigsby, Esq.
1001 Pennsylvania Avenue, NW
Suite 600

Washington, DC 20024
Counsel for Plaintiff

Alex Grant, Esq.
1997 Annapolis Exchange Parkway
Suite 400-the Annapolis Exchange
Annapolis, MD 21401
Counsel for Defendants

APPENDIX D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Civil Action No.: 2005 CA 007034 B

[Filed April 22, 2008]

MILLICENT HODGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
NAVY YARD SUNOCO, INC., *et al.*,	)
	)
Defendants.	)
	)

Judge Jeanette J. Clark
Calendar 12

Next Event: Appeal

ORDER DENYING PLAINTIFF'S SECOND MOTION TO SET ASIDE THE VERDICT AND FOR A DEFAULT JUDGMENT; OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Upon consideration of Plaintiff's Second Motion to Set Aside the Verdict and for a Default Judgment; or, in the Alternative, Motion for a New Trial ("Motion")

and the record herein, the Motion is denied for failure to comply with Judge Morin's Court Order docketed March 26, 2007.

WHEREFORE, it is this 22nd day of April 2008, hereby,

ORDERED, that the Motion is **DENIED** for failure to comply with Judge Morin's Court Order docketed March 26, 2007; and it is

FURTHER ORDERED, that for each Motion filed, the parties shall e-mail a copy of the proposed order in Microsoft Word Format to the following e-mail addresses pursuant to this Court's General Order: **Clarkjj2@dcsc.gov** and **Clarkjj3@desc.gov**.

SO ORDERED.

/s/_____
Judge Jeanette J. Clark
DC Superior Court

Copies E-filed and Docketed on this 22nd day of April 2008:

Sherlock Grigsby, Esq.
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Washington, DC 20024
Counsel for Plaintiff

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Suite 400-the Annapolis Exchange

Annapolis, MD 21401
Counsel for Defendants

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Civil Action No.: 2005 CA 007034 B

[Filed April 22, 2008]

MILLICENT HODGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
NAVY YARD SUNOCO, INC., *et al.*,	)
	)
Defendants.	)
	)

Judge Jeanette J. Clark
Calendar 12

Next Event: Appeal

ORDER DENYING PLAINTIFF'S REQUEST FOR LEAVE TO FILE A REPLY IN SUPPORT OF PLAINTIFF'S SECOND MOTION TO SET ASIDE THE VERDICT AND FOR A DEFAULT JUDGMENT; OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Upon consideration of Plaintiff's Request for Leave to File a Reply in Support of Plaintiff's Second Motion to Set Aside the Verdict and for a Default Judgment; or, in the Alternative, Motion for a New Trial ("Motion") and the record herein, the Motion is denied

for failure to comply with Judge Morin's Court Order docketed March 26, 2007.

WHEREFORE, it is this 22nd day of April 2008, hereby,

ORDERED, that the Motion is **DENIED** for failure to comply with Judge Morin's Court Order docketed March 26, 2007; and it is

FURTHER ORDERED, that for each Motion filed, the parties shall e-mail a copy of the proposed order in Microsoft Word Format to the following e-mail addresses pursuant to this Court's General Order: **Clarkjj2@dcsc.gov** and **Clarkjj3@dcscgov**.

SO ORDERED.

/s/
Judge Jeanette J. Clark
DC Superior Court

Copies E-filed and Docketed on this 22nd day of April 2008:

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1997 Annapolis Exchange Parkway
Suite 400-the Annapolis Exchange
Annapolis, MD 21401
Counsel for Defendants

APPENDIX E

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Civil Action No.: 2005 CA 007034 B

[Filed May 6, 2008]

MILLICENT HODGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
NAVY YARD SUNOCO, INC., *et al.*,	)
	)
Defendants.	)
	)

Judge Jeanette J. Clark
Calendar 12

Next Event: Appeal

ORDER DENYING, WITHOUT PREJUDICE, PLAINTIFF'S THIRD MOTION TO SET ASIDE THE VERDICT AND FOR A DEFAULT JUDGMENT; OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Upon consideration of Plaintiff's Third Motion to Set Aside the Verdict and for a Default Judgment; or,

in the Alternative, Motion for a New Trial ("Motion") that was filed on April 28, 2008, and the record herein, the Motion is denied, without prejudice, because Plaintiff filed Plaintiff's Third Motion to Set Aside the Verdict and for a Default Judgment; or, in the Alternative, Motion for a New Trial on May 2, 2008.

WHEREFORE, it is this 6th day of May 2008, hereby,

ORDERED, that the April 28, 2008 Motion is **DENIED, without prejudice,** for the reasons stated above; and it is

FURTHER ORDERED, that for each Motion filed, the parties shall e-mail a copy of the proposed order in Microsoft Word Format to the following e-mail addresses pursuant to this Court's General Order: **Clarkjj2@dcsc.gov** and **Clarkjj3@dcsc.gov**.

SO ORDERED.

/s/
Judge Jeanette J. Clark
DC Superior Court

Copies E-served and Docketed on this 6th day of May 2008:

Sherlock Grigsby, Esq.
1001 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20024
Counsel for Plaintiff

Alex Grant, Esq.
1997 Annapolis Exchange Parkway
Suite 400-the Annapolis Exchange
Annapolis, MD 21401
Counsel for Defendants

APPENDIX F

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Civil Action No.: 2005 CA 007034 B

[Filed June 16, 2008]

MILLICENT HODGE,	)
	)
Plaintiff,	)
	)
v.	)
	)
NAVY YARD SUNOCO, INC., *et al.*,	)
	)
Defendants.	)
	)

Judge Jeanette J. Clark
Calendar 12

Next Event: Appeal

ORDER DENYING PLAINTIFF'S FOURTH MOTION TO SET ASIDE THE VERDICT AND FOR A DEFAULT JUDGMENT; OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Upon consideration of Plaintiff's Fourth Motion to Set Aside the Verdict and for a Default Judgment; or, in the Alternative, Motion for a New Trial ("Motion"),

Defendants' Opposition ("Opposition") thereto, and the record herein, the Motion is denied because it was not timely filed.

Here, Plaintiff filed a Motion requesting a new trial[1] because "([n]early every decision in this action, based on either party's motions, has been granted in error in favor of Defendants." Motion at 3. Motions seeking "relief from the adverse consequences of the original order on the basis of error of law . . . [are] properly considered under D.C. Super. Ct. R. Civ. P. 59(e)." *Nuyen v. Luna*, 884 A.2d 650, 654-55 (D.C. 2005) (holding that the nature of a motion does not turn on its caption or label but rather its substance). Furthermore, "the trial court has broad latitude in ruling on a motion for a new trial . . . ." *Wolff v. Wash. Hosp. Ctr.*, 938 A.2d 691, 694 (D.C. 2007) (denying plaintiffs motion for new trial filed pursuant to 59(e)).

Super. Ct. Civ. R. 59(b) provides that "[a]ny motion for a new trial shall be filed no later than 10 days after the entry of judgment." *See District of Columbia v. Jackson*, 878 A.2d 489, 492 (D.C. 2005) (holding timing requirements for Super. Ct. Civ. R 59 motions are inflexible and jurisdictional).

Here, Plaintiff's first Motion, which was denied, without prejudice, pursuant to Court Order dated March 25, 2008, was originally filed on March 19, 2008, fifteen (15) business days after the February 27,

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[1] Plaintiff's other requests: (i) a reversal of the rulings in favor of Defendants in this action and (ii) move to amend complaint are untimely pretrial issues that will not be entertained post trial. Therefore, the Court treats the Motion as one for a new trial.

2008 entry of judgment before the parties. Furthermore, Plaintiff does not cite any new or changed circumstances that persuade the Court to change its prior rulings. Accordingly, the Motion is deemed untimely.

WHEREFORE, it is this 16th day of June 2008, hereby,

ORDERED, that the Motion is **DENIED** for the reasons stated above; and it is

FURTHER ORDERED, that for each Motion filed, the parties shall e-mail a copy of the proposed order in Microsoft Word Format to the following e-mail addresses pursuant to this Court's General Order; **Clarkjj2@dcsc.gov** and **Clarkjj3@dcsc.gov**.

SO ORDERED.

/s/
Judge Jeanette J. Clark
DC Superior Court

Copies e-served and docketed on this 16th day of June 2008:

Sherlock Grigsby, Esq.
1001 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20024
Counsel for Plaintiff

Alex Grant, Esq.
1997 Annapolis Exchange Parkway
Suite 400-the Annapolis Exchange

Annapolis, MD 21401
Counsel for Defendants

APPENDIX G

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Case No. 2005 CA 007034 B

[Filed March 26, 2007]

Millicent Y. Hodge,	)
	)
Plaintiff,	)
	)
v.	)
	)
Sunoco, Inc., *et al.*,	)
	)
Defendants.	)
	)

Calendar 12
Judge Robert E. Morin

***SUA SPONTE* ORDER**

The Court has previously issued an order limiting the parties' written submissions to 10 pages. Apparently, Plaintiff has attempted to avoid the consequences of this Order by submitting pleadings in smaller font, with reduced margins, and with excessive footnotes and attachments. Therefore, the Court amends its previous Order and requires that, absent

leave of Court, all pleadings shall (1) be in 12-point font, (2) be double spaced, (3) have standard margins of at least 1 inch, (4) not contain any footnotes, and (5) not include any attachments that have already been filed with the Court.

Wherefore, it is this **26th day of March 2007** hereby,

SO ORDERED.

/s/
Judge Robert E. Morin
(Signed in Chambers)

Copies to:

Alex M. Grant
8737 Colesville Road, Suite L200
Silver Spring, Maryland 20910

Millicent Y. Hodge
907 6th Street, S.W.
Suite 513C
Washington, D.C. 20024

APPENDIX H

Concealed Arrest Records of Defendants

[See next 5 pages]

Close Open Save Print Search

Search Clear

Criteria		
Last Name	MATTINGLY	Case Number
		Ticket
First Name	JOHN	Nbr
Company		

Search Results

Party	Aff 1	Party Type	D.O.B.	S.S.N.	Case Number	Status	Judge
MATTINGLY, JOHN C		CDEF	03/28/1961		1979 FEL 002042	C	
MATTINGLY, JOHN C		CDEF	03/28/1961		1992 CMD 016022	C	PYD

Party	Aff 1	Party Type	D.O.B.	S.S.N.	Case Number	Status	Judge
MATTINGLY, JOHN C		CDEF	03/28/1961		1993 CDC 002505	C	JHT
MATTINGLY, JOHN C		CDEF	03/28/1961		1998 CMD 010561	C	
MATTINGLY, JOHN E		CDEF	01/21/1957		1978 CMD 006859	C	GHR
MATTINGLY, JOHN E		CDEF	01/21/1957		1985 FEL 006794	C	ALH
MATTINGLY, JOHN E		CDEF	01/21/1957		1985 FEL 007539	C	JSE
MATTINGLY, JOHN H		CDEF	11/08/1959		1984 CMD 008910	C	GHR

Party	Aff 1	Party Type	D.O.B.	S.S.N.	Case Number	Status	Judge
MATTINGLY, JOHN H		CDEF	11/08/1959		2003 FEL 005530	C	
MATTINGLY, JOHN H		CDEF	11/08/1959		2004 CMD 005939	C	DMB
MATTINGLY III, JOHN H	AKA	CDEF	11/08/1959		1984 CMD 008910	C	GHR
MATTINGLY III, JOHN H	AKA	CDEF	11/08/1959		2003 FEL 005530	C	
MATTINGLY III, JOHN H	AKA	CDEF	11/00/1959		2004 CMD 005939	C	DMB

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Docket Parties Notes Tickler Costs Events Docket Group Servce Sumry

Release Status | Bond Amt | Case Judge BRENNEMAN, DIANE M
Arrest Agency | Badge # | Officer

Defendant (Criminal)	1 of 1
Full Name MATTINGLY, JOHN H	Alias Name(s) MATTINGLY III, JOHN H
D.O.B. 11/08/1959	1 of 2
PDID 371317 DCDC#	Address Type Home Address
DLN DL St	Address 1234 VAN BUREN DRIVE
Gender Male Race *White	City/ST/Zip FT. WASHINGTON MD
0 of 0	Address Type Home Address
Attorney(s)	Address 1234 VAN BUREN DR
Code	City/ST/Zip FT WASH MD

Charge1 U003 Type: Pro CCN Arrest# 010401724Arrest Dt05/18/2004 Description SIMPLE ASSAULT	0 of 0 Enhancement(s)

Next Event Date/Time Event Judge Case Disp No Papered Disp Date 06/09/2004	0 of 0 Linked Group(s)

Prosecutors 0 of 0 Agency Full Name Case Comments	Case Attributes Case Number 2004 CMD 005939 Filed 06/08/2004 Status Closed Secret Case F Incomplete F

APPENDIX I

THE DISTRICT OF COLUMBIA COURT OF APPEALS

Civil Action No. 2005 CAB 007034
No. 08-CV-991

[Dated September 8, 2008]

MILLICENT Y. HODGE Appellant,	)
v.	)
SUNOCO, INC., and NAVY YARD SUNOCO, INC. Appellees.	)

Chief Judge
Eric T. Washington

TABLE OF AUTHORITIES FOR APPELLANT'S RESPONSE TO SHOW CAUSE ORDER OR, ALTERNATIVELY, MOTION FOR EXTENSION OR REMAND

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See also Sherrod v. Nash General Hosp., Inc.,
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THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Civil Action No. 2005 CAB 007034
No. 08-CV-991

MILLICENT Y. HODGE,	)
Appellant,	)
	)
v.	)
	)
SUNOCO, INC., and	)
NAVY YARD SUNOCO, INC.,	)
Appellees.	)
	)

Chief Judge
Eric T. Washington

APPELLANT'S RESPONSE TO SHOW CAUSE ORDER OR, ALTERNATIVELY, MOTION FOR EXTENSION OR REMAND

In an order dated August 20, 2008, the Appeals Court granted the appellant, Millicent Hodge, ("Appellant" or "Plaintiff"), twenty (20) days to show cause why her appeal against the appellees, Sunoco, Inc. and Navy Yard Sunoco, Inc. ("Appellees" or "Defendants"), should not be dismissed. We humbly request that the Court hear the appeal on its merits on the grounds set forth herein or otherwise, or as may be determined pursuant to the inherent powers of the Court.

First, the appeal was timely filed. Second, any earlier appeal would have sought a premature judicial

review of interim rulings in advance of substantive rulings. Third, such an appeal would have inappropriately resulted in multiple judicial reviews.

However, in the event that the Court determines otherwise, we respectfully move for an extension or a remand to the lower court to request such an extension. The Defendants did not respond to a request for their consent to this filing.

Relevant Facts.

After the trial, the Appellant/Plaintiff discovered through non-defendant sources that the Defendants had fraudulently concealed the arrest records of their key witness.[12] The key witness lied about such matters under oath on the stand during trial.[13] Defense counsel and corporate representatives of both Defendants were present in the courtroom and did not correct the record. Prior to the trial, Defendants had been ordered by the Court to provide discovery, including depositions. Defendants refused to produce a single requested document regarding any witness, including any employee records.[14] No defendant-

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[12] The arrest records are attached to the post-trial filing at Exhibit "A".

[13] *See* Trial Transcript for February 26, 2008 at p. 211, lines 15-18. Additional citations to the record, including to the trial transcript, are contained in the post-trial filings (which are incorporated herein by reference).

[14] Pursuant to Superior Court Rule 26, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

witnesses appeared for court-ordered depositions. Such matters, *inter alia*, were the subject of the post-trial filings. The trial court denied such filings without prejudice for lack of a courtesy paper copy, formatting, and a clerical error (that was corrected prior to review). The Appellant sought to comply with such orders prior to filing the notice of appeal to obtain a final appealable order on the merits required for judicial review by a higher court.

Grounds Against Dismissal

A. First, a party generally has the right to appeal only from an order or judgment that is final as to all claims and all parties. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *In re Estate of Chuong*, 623 A.2d 1154 (D.C. 1993)(en banc). An order is final only if it disposes of the entire case on the merits so that the court has nothing remaining to do but to execute the judgment or decrees already rendered. *Chuong*, 623 A.2d at 1157. However, the trial court's rulings on the prior post-trial filings were not final appealable orders. The rulings were granted without prejudice. The rulings were not on the merits. The rulings were not final as to any claims or parties. The substance and form of the rulings did not constitute final rulings.

1. The trial court's prior post-trial rulings were not final appealable orders as they were granted without prejudice. According to Black's Law Dictionary (5th Ed.), "[w]here an offer or admission is made "without prejudice," or a motion is denied or a suit dismissed "without prejudice," it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided. [...] A dismissal

"without prejudice" allows a new suit to be brought on the same cause of action. The words "without prejudice", as used in judgment, ordinarily import the contemplation of further proceedings, and, when they appear in an order or decree, it shows that the judicial act is not intended to be res judicata of the merits of the controversy." *Dozier v. Ford Motor Co.*, 227 U.S. App. D.C. 1, 702 F.2d 1189, 1194 (D.C. Cir. 1983)(A dismissal without prejudice does not have a preclusive effect in future litigation); *U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007)(A dismissal without prejudice is not a final appealable order unless the plaintiff can no longer amend the pleading or unless the plaintiff declares an intention to stand on the pleading as dismissed); *Marshall v. Kansas City Southern Ry. Co.*, 378 F.3d 495, 59 Fed. R. Serv. 3d 243 (5th Cir. 2004)(A party can not use a voluntary dismissal without prejudice as an end-run around the final judgment rule to convert an otherwise non-final, and thus nonappealable, ruling into a final decision appealable under the appellate jurisdiction statute); *Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973) (a dismissal without prejudice to filing an amended pleading is not a final order where some amendment is possible). In the instant case, the Appellant amended her filing in accordance with orders from the trial court with the understanding that no rights or privileges had been waived or lost.

2. The trial court's prior post-trial rulings were not final appealable orders as they did not dispose of the entire case on the "merits." According to Black's Law Dictionary (8th Ed.), the "merits" are defined as "the elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical

point[s], esp. of procedure." The trial court's rulings on the prior post-trial filings were based on "extraneous or technical points" and did not deal with the "elements or grounds of a claim or defense" or "substantive considerations." *See Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 119 S.Ct. 1915, 144 L. Ed. 2d 184, 43 Fed. R. Serv. 3d 739 (1999)(A decision ordinarily is not "final" for purposes of appeal, unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment).

The lower court denied the post-trial filings without prejudice because (1) the lower court wanted a paper courtesy copy;[15] (2) the lower court wanted different formatting (although the filing complied with the rules); and (3) the lower court wanted a clerical error to be corrected by the court clerk (although the clerk corrected it prior to review).[16] (*See* Exhibit "B" from Case File Xpress attached to the post-trial motion).[17] Pursuant to the Appellate Court's rules and policy of judicial economy, Appellant complied with each

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[15] First, it was the first time during 2+ years of litigation that the lower court requested a paper courtesy copy of any filing. Second, the court considered and granted, in part, Defendants' motion for summary judgment (which exceeded 100 pages) without a courtesy paper copy. Finally, if the trial court had contacted counsel, such a copy would have been provided.

[16] *See* March 25, 2008; April 22, 2008; and May 6, 2008 Orders ("prior post-trial filings").

[17] *Willis v. Newsome*, 747 F.2d 605, 606 (11th Cir. 1984)(unique circumstances exception held applicable where litigant relied upon erroneous oral representations made by district court clerk).

interlocutory order prior to filing a notice of appeal.[18] The Appellant timely filed her notice of appeal within the 30-day period of the trial court's first appealable order on a post-trial filing.

3. The trial court's prior post-trial rulings were not final appealable orders based on the substance of the rulings. The Courts will look to the substance of a ruling to determine whether it is a final appealable order. First, the rulings do not state that they are final. Second, the docket does not state that they are final. Third, the substance of the rulings, as described hereinabove, do not constitute final appealable rulings on the merits.

B. Tolling Allowed Under Rule 50(b), 52(b), 59 or other rules.

Appellant's timely filings tolled the running of the 30-day period under Rules 50(b), 52(b), 59 or other rules or laws. Pursuant to such rules and case law, successive tolling is allowed under these circumstances. Generally, the basic grounds for a Rule 59(e) motion are: 1) to take account of an intervening change in controlling law; 2) to take account of newly discovered evidence; 3) to correct clear legal error; and 4) to prevent manifest injustice. *Harvey v. District of Columbia,* 949 F.Supp. 878, 879 (D.D.C.1996); *American Federation of Government Employees v. District of Columbia Financial Responsibility and Management Assistance Authority*, 133 F.Supp.2d 75 (D.D.C., 2001). Appellant's filings met these and other

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[18] Moreover, such rulings were not applied to the Defendants or other litigants.

requirements (e.g. paper courtesy copy, formatting, clerical error, new evidence, fraud, etc.). Each ruling created a new judgment which tolled the time.[19] Each ruling by the court was eliminated by the subsequent motion and ruling. *American Federation of Government Employees, supra.* The Courts will consider substance over form if such relief is requested in the filing.

C. Successive tolling Allowed for New and Different Grounds.

As with the other filings, the second post-trial filing asserted additional, substantially different grounds for a new trial than those attested to in the first post-trial

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[19] Generally, where petition for rehearing, motion for new trial, or motion to vacate, amend or modify judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion. Fed. Rules Civ. Proc., Rules 52(b), 73(a), 28 U.S.C.A.; 28 U.S.C.A. § 2107. District of Columbia Rule 52(b).

Where plaintiff after securing an enlargement of time [by action or motion] filed a motion to amend and supplement findings and conclusions and motion was not addressed to mere matters of form but raised questions of substance and sought reconsideration of certain basic findings and alteration of the court's conclusions, the motion deprived the judgment of that "finality" which is essential to appealability even though plaintiff did not specifically request amendment of judgment, and therefore time to appeal did not begin to run until disposition of the motion. Fed. Rules Civ. Proc., Rules 6(b), 52(b), 28 U.S.C.A.; 28 U.S.C.A. § 2107. *See Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 63 S.Ct. 543 (U.S. 1943).

motion.[20] The filing asserted the continuing misconduct and abuse of the judicial system by Defendants and defense counsel through each phase of the litigation, including pre-trial matters, as grounds for granting the filing.[21] Thus, the filing deprived the judgment of the "finality" which is essential to appealability and therefore time to appeal did not begin to run until disposition of the motion. Fed. Rules Civ. Proc., Rules 6(b), 52(b), 28 U.S.C.A; 28 U.S.C.A. § 2107. *See also Sherrod v. Nash General Hosp., Inc.*, 348 N.C. 526, 500 S.E. 2d 708 (1998)(the plaintiff's subsequent motion for a new trial extended the 30-day period in which to give notice of appeal, where the second motion asserted additional, substantially different grounds for a new trial than those attested to in her first motion for a new trial`

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[20] Generally, where petition for rehearing, motion for new trial, or motion to vacate, amend, or modify judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion. Fed. Rules Civ. Proc., rules 52(b), 73(a), 28 U.S.C.A.; 28 U.S.C.A. § 2107. District of Columbia Rule 52(b).

Where plaintiff after securing an enlargement of time [by action or motion], filed a motion to amend and supplement findings and conclusions and motion was not addressed to mere matters of form but raised questions of substance and sought reconsideration of certain basic findings and alteration of the court's conclusions, the motion deprived the judgment of that "finality" which is essential to appealability even though plaintiff did not specifically request amendment of judgment, and therefore time to appeal did not begin to run until disposition of the motion. Fed.Rules Civ.Proc., rules 6(b), 52(b), 28 U.S.C.A.; 28 U.S.C.A. § 2107.

[21] *See* Plaintiff's second post-trial filing and reply at Exhibit "A".

D. Successive tolling Allowed for Amended Motions.

As set forth hereinabove, the post-trial filings were amended to comply with three orders from the Court.[22] According to Black's Law Dictionary, "the amendment relates back to the original pleading if the subject of it arose out of the transaction set forth or attempted to be set forth in the original pleading. Fed. R. Civil P. 15(c)." Further, whether a post-judgment motion is among those which will toll the time for appeal is determined by the substance of the motion, rather than its label. *See Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108 S. Ct. 1130, 99 L. Ed. 2d 289, 10 Fed. R. Serv. 3d 305 (1988)(construing Fed. R. App. P. 4(1)(4)). Courts will construe a motion, however styled, to be the type proper for the relief requested. *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632 (9th Cir. 1989).

In addition, the trial court treated its prior post-trial orders as non-final, non-appealable and non-substance rulings as it sought to base its ruling on the last post-trial filing on the docketing date of the first post-trial filing.[23] (Please also note that the lower court cited and relied upon the wrong date as the docketing date; and thus, its last ruling was also wrong).[24] We respectfully ask the Appeals Court to consider

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[22] *Friend v. Friend*, 609 A.2d 1137, 1138 (D.C.1992) (The nature of a motion is not determined by its caption, but rather by the nature of the relief sought).

[23] *See* June 16, 2008 Order.

[24] *See* June 16, 2008 Order. *Cf. Johnson v. Johnson*, 401 A.2d 962, 965 (D.C.1979)(judgment not final until entered by the Clerk).

substance over form and permit the appeal as timely filed.

Motion for an Extension or Remand

The appeal was timely filed based on a final order. However, in the event that the Appeals Court determines that there was insufficient tolling, we respectfully move for an extension (or request a remand so an appropriate filing may be submitted to the Superior Court)[25] on the grounds set forth herein or any other applicable grounds, including but not limited to the following: the doctrines of unique circumstances; delay caused by actions of the trial court; excusable neglect; or misinterpretation of the laws or rules governing the time to appeal.[26]

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[25] A remand is requested to file an extension, request a final order on the merits, or to file any other appropriate filing in the trial court. *See Seshachalam v. Creighton University School of Medicine*, 545 F.2d 1147, 22 Fed. R. Serv. 2d 1042 (8th Cir. 1976)(Allowed remand to district court to give appellant the opportunity to request that the district court accept nunc pro tunc the notice of appeal on grounds of excusable neglect based on "all the circumstances" including the filing of ssubsequent post-trial motions erroneously heard by court).

[26] The post-trial filings requested that they be granted "pursuant to Superior Court Rules 50, 51, 59, *other rules*, and the inherent powers of the Court" which includes the rules governing remand or extensions. (*See* filings at p.1). Further, the filings moved for the matters set forth herein and *any related matters*" which includes a remand or extension. (*See* filings at last paragraph). The filings also incorporated by reference all prior filings.

E. Doctrine of Unique Circumstances.

If the Court determines that there was insufficient tolling, we respectfully request that the doctrine of unique circumstances apply. Under the doctrine of unique circumstances, the appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed. 2d 146, 13 Fed. R. Serv. 3d 1 (1989).[27]

The D.C. Courts and other courts have construe this exception broadly, permitting an appeal when the lower court, although not specifically stating that a motion was timely, acts upon the motion or grants an improper extension of the unwaivable time limits, thereby inducing the parties to believe the time to file a notice of appeal has been extended. The doctrine applies to trial court rulings which, although lacking explicit assurances extending or postponing the appeal deadline, nevertheless led parties reasonably to believe that the deadline had been extended. *See, e.g., Aviation Enterprises, Inc. v. Orr*, 716 F.2d 1403, 1406

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[27] The Supreme Court has recognized an exception known as the unique circumstances doctrine, under which appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline. *See, e.g., Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *Thompson v. INS*, 375 U.S. 384 (1964); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962); *see also Center for Nuclear Responsibility v. NRC*, 781 F.2d 935, 941 & n.11 (D.C. Cir. 1986).

n.25 (D.C. Cir. 1983)(unique circumstances exception applied where litigant believed appeal period had been extended based on district court's vacation of initial order and issuance of superseding order); *Webb v. Dep't of Health & Human Services,* 696 F.2d 101, 106 (D.C. Cir. 1982) (unique circumstances exception applied where district court appeared to treat appellant's motion for attorney fees as a motion under Fed. R. Civ. P. 59(e), the proper filing of which tolls the time for noting an appeal); *Pinion v. Dow Chemical, U.S.A.*, 928 F.2d 1522, 19 Fed. R. Serv. 3d 414 (11th Cir. 1991)(unique circumstances exception broadly construed); *Fairley v. Jones*, 824 F.2d 440, 8 Fed. R. Serv. 3d 994 (5th Cir. 1987)(unique circumstances exception broadly construed). In the instance case, the lower court acted upon each of the post-trial filings, thereby inducing the parties to believe the time to file a notice of appeal had been extended.

Further, the courts follow the federal doctrine permitting parties to maintain otherwise untimely appeals where the appellant reasonable and in good faith relies upon judicial action seemly extending the appeal period.[28] *Schroeder v. Urban*, 242 Kan. 710, 750 P.2d 405 (1988). In the instant case, the Appellant reasonable and in good faith relied upon judicial action seemly extending the appeal period. The court's action occurred prior to the expiration of the official period and the Appellant filed a notice of appeal before expiration of the period apparently judicially extended.

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[28] Defendants' opposition did not raise any of the grounds relied upon by the trial court. The first post-filing was timely filed. The court's action occurred prior to the expiration of the official period and the Appellant filed a notice of appeal before expiration of the period apparently judicially extended.

Moreover, under such doctrine, the court of appeals will hear an appeal filed after the denial of the subsequent request where a trial judge hears a subsequent motion for reconsideration. *Gibson v. Missouri Pac. R. Co.*, 579 F.2d 890 (5th Cir. 1978). In the instant case, the trial judge heard and ruled upon the subsequent motions.

We spoke with the Court. It was our understanding that further action was contemplated by the Court, which indeed took place, and that no rights or privileges of the Appellant would be waived or lost by complying with the orders of the trial court. We reasonably relied upon rulings of the court. Therefore, it seemed reasonable, and indeed prudent, to address the concerns of the trial court prior to filing a notice of an appeal. Further, if orders had been appeals as non-final, then the Appeals Court would have been required to dismiss the appeal for want of jurisdiction.

F. Delay Caused by Actions of the Court.

We respectfully ask the Appeals Court to consider the appeal on its merits pursuant to *Hall v. C.I.A.* 437 F.3d 94 (D.C. Cir. 2006)(the relaxation of the time limits for filing a notice of appeal is permitted under circumstances involving reasonable reliance on a district court's decisions in response to motions labeled as being brought under the rule governing motions to alter or amend a judgment). As set forth hereinabove, in the instant case, the Appellant reasonably relied upon the trial court's decisions. *See also Seshachalam v. Creighton University School of Medicine*, 545 F.2d 1147, 22 Fed. R. Serv. 2d 1042 (8th Cir.

1976)(Subsequent post-trial motion erroneously heard by court allowed tolling).

G. Doctrine of Excusable Neglect.

If the Court determines that there was insufficient tolling, we respectfully request the Court to consider the following matters:

1. Misinterpretation of Interaction of Lower Court Orders and Appeals Court Rules.

A court may grant an extension to file a notice of appeal on the grounds that an attorney misinterpreted the laws and rules governing the time to appeal. *Torockio v. Chamberlain Mfg. Co.*, 56 F.R.D. 82, 16 Fed. R. Serv. 2d 486 (W.D. Pa. 1972), aff'd, 474 F.2d 1340 (3d Cir. 1973)(An extension was properly granted where there was confusion over whether an order dismissing a case without prejudice was appealable, the attorney believing that an amended pleading could be filed in light of the fact that the appellee was not prejudiced by the extension). *See also Wansor v. George Hantscho Co., Inc.*, 570 F.2d 1202, 25 Fed. R. Serv. 2d 525 (5th Cir. 1978); *Feeder line Towing Serice, Inc. v. Toledo, P. & W. R.R. Co.*, 539 F. 2d 1107, 22 Fed. R. Serv. 2d 395 (7th Cir. 1976). *See also In re Buckingham Super Markets, Inc.*, 534 F.2d 976, 175 U.S.App.D.C. 239 (D.C. Cir. 1976)(remand allowed to request extension for excusable neglect)(*cited Torockio v. Chamberlain Mfg. Co., supra*).

As is evidenced by the case law on this issue, litigants and courts are both frequently confused by the interaction of non-final, non-appealable post-trial

filings by the lower court and the tolling period for filing an appeals notice. The question a litigant is left with is what to do with a non-final, non-appealable, non-substantive order on a matter critical to the case with the tolling period looming? The appellate rules require final rulings for review;[29] while, on the other hand, rulings not on the merits, without prejudice or which are otherwise not final require further action or the related rights or privileges will be lost or waived and cannot be appealed. *Jung v. K. & D. Mining Co., Inc.*, 356 U.S. 335, 78 S.Ct. 764, 2 L.Ed.2d 806 (1958)(holding that there was no final judgment and therefore could be no appeal when the pleading could have been amended. The Supreme Court noted the "hazards of confusion or misunderstanding" as to the time for appeal when there is no final judgment). *Wmx Technologies, Inc., F/k/a/ Waste Management, Inc., Adelaware Corporation, and Waste Management of California, Inc., v. Edwin L. Miller, Jr., U. S. Court of Appeals*, 104 F.3d 1133 (Ninth Circuit 1997)("We are sometimes faced with construction difficulties when a [pleading] is simply dismissed without prejudice. Absent further explicit illumination from the district court, we may have to determine from the whole record whether it was contemplated that the dismissal was for lack of jurisdiction, whether further amendment was anticipated, whether the district court made it plain that there could be no further amendment, or whether it was contemplated that the whole action was dismissed on the merits. It would always be

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[29] It is also a risky proposition for an appellant to file a notice of appeal prior to receiving a non-final ruling on a critical matter as the Appeals Court can refuse to hear the matter if the lower court fails to rule on the matter prior to the appeal being docketed.

helpful if district courts made their intentions in that regard both plain and explicit.").

2. Timely Notice of Appeal to Appellees and Superior Court.

The Appellees and the Superior Court were placed on written notice within ten (10) days of the docketing of the verdict of the impending appeal and its substance. The post-trial filings noted in the caption box on the first page that an appeal would be taken. The substance of the appeal will be substantially similar to the post-trial filings. Thus, the Appellees and the Superior Court have suffered no prejudice, inconvenience or hardship.

Context of Case:
Evidence Destruction and Fraudulent Concealment by Defendants/Appellees.

The Defendants destroyed the documents pertaining to this case. The Defendants erased every surveillance videotape recording the actions of the Defendants and the physical injury to Plaintiff on the Defendants' premises. Such documents included credit card receipts, bills and invoices. Such videotapes included eighteen (18) videotapes from three (3) cameras [30]

The Defendants fraudulently concealed the arrest records of the key defendant-witness during 2½ years

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[30] Citations to the record, including the trial transcript, are contained in the post-trial filings (which are incorporated herein by reference).

of litigation. The witness was arrested on the Defendants' premises under similar circumstances.[31] The Defendants, a $25 billion entity with a document retention policy and document retention training, admitted receiving written notification of an impending lawsuit within four (4) business days of the events. They testified that Plaintiff was unconscious on their premises the day of the events surrounded by paramedics, an ambulance and a fire truck.[32]

The rulings of the trial court pertaining to such matters, *inter alia*, constitute the grounds for the post-trial motion and appeal.

Cumulative Effect of Trial Court Errors.

The cumulative affect of the lower courts' errors resulted in (1) six or more claims in the original complaint being stricken the morning of trial prior to opening statements in error and without the benefit of notice or a motion for summary judgment filed by Defendants with respect to such claims; (2) any and all proposed amended claims being denied one year to one and one-half years (1-1½ years) prior to trial; (3) defendant-witnesses on the stand who refused to

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[31] Such evidence came to the attention of Plaintiff, from non-defendants sources, only after the trial. The arrest records are attached to the post-trial filing. Thus, there is evidence in the record that John Mattingly, III, manager of Navy Yard Sunoco, Inc., was arrested on multiple occasions. Such evidence would have led to new claims and admissible evidence during the trial. There is no evidence in opposition in the record. Statements by counsel are not evidence.

[32] *Id.*

appear for court-ordered depositions; (4) defendant-witnesses on the stand for whom Defendants refused to produce a single requested document during court-ordered discovery; (5) summary judgment granted on punitive damages in violation of Rule 12-I which is fatal to a motion; (6) initial admission responses by Defendants dated April 2006 being stricken as a trial exhibit (P47) for which no motion had been filed and none had been granted. (*See* trial exhibits attached to post-trial motion incorporated herein); (7) deemed admissions by Defendants which were served pursuant to a discovery order and for which a motion to strike was never served on opposing counsel also being stricken as a trial exhibit (P48); (8) newly discovered evidence, including arrest records of the key witness of the Defendants/Appellees, not considered; (9) jury instructions that there was no oral contract as part of the remaining breach of contract claims given in error and without notice to the parties and in contradiction to the facts and the trial testimony; and (10) no jury instructions given to the jury on, including, but not limited to, (i) original claims; (ii) amended claims; (iii) claim for failure to render medical assistance – based on Defendants' written corporate policy which required Defendants to render medical assistance to business invitees (P42, Defendants' Injury Reporting Policy (erroneously excluded) – which was excluded without (a) input by the parties prior to the ruling, (b) a summary judgment motion filed by Defendants, or (c) notice to the parties; (iv) punitive damages; (v) liability of Sunoco, Inc.; and (v) judicial notice of facts found by Judge Morin (March 2006 Ruling) and EPA regulations setting national standards for auto mechanics and record-keeping for Freon (which Defendants were required to follow pursuant to their franchise agreement (P38) and ethics policy (P49)). *See*

United States v. Jacobs, 108 Daily Wash. L. Rptr. 1, 9-10 (D.C. Super. Ct. Jan. 2, 1980)(court took judicial notice of federal regulation during consideration of post-trial motion).[33]

Conclusion

In good faith and with all due diligence, Ms. Hodge complied with orders from the District of Columbia Superior Court. An earlier appeal would have been inappropriately based on a non-final, non-appealable ruling that was without prejudice or not on the merits and thus would have been requesting a premature judicial review of clearly interim rulings in advance of substance rulings. Such an appeal would have inappropriately resulted in multiple judicial reviews. Hence, we ask that Ms. Hodge not lose her claim after years of litigation against a bigger and stronger opponent due to a courtesy paper copy, formatting and a clerical error by the lower court. We respectfully ask for your full consideration.

Respectfully submitted,

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[33] *See* specific arguments and citations to the record, including the trial transcript, in the post-trial motion, which are incorporated herein. Please note that Defendants have not denied such matters on the merits.

APPENDIX J

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.